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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/751,070

01/02/2004

Lynette Damir

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BLACK LOWE & GRAHAM, PLLC
701 FIFTH AVENUE
SUITE 4800
SEATTLE, WA 98104

EXAMINER

HALE, GLORIA M

ART UNIT

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3765

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/751,070	Applicant(s) DAMIR ET AL.	
	Examiner Gloria Hale	Art Unit 3765	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 December 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 39-41 and 44-51 is/are pending in the application.
 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 39-41 and 44-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 39,41 and 44-51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Isola et al (US 3,613,133) and Common knowledge.

Isola et al discloses a blanket 16 with illustrations thereon. Isola et al discloses that any known illustration desired can be placed on the blanket including scenes, articles and persons etc. (See Isola et al, col.11, lines 8-48 and figure 16; and col. 5, line 41- col. 6, line 16). However, Isola et al does not specifically disclose the fold illustrations on the blanket as especially claimed. Accordingly it would have been obvious to one having ordinary skill in the art to place any desired indicia on the blanket as desired for aesthetic purpose or for directions such as that disclosed in Isola et al. Isola et al also discloses the placement of a person on a blanket. The illustration is painted on the blanket and is reproduced in any known manner such as those claimed that are well known indicia processes. (See col. 11, lines 35-49). The illustrated method of swaddling a baby in place of Isola et al's placement of a person on a blanket is just a change in a printed matter and would be an obvious substitution of common knowledge information that would only be limited by the imagination of the user. The only difference of the claimed invention over Isola et al's invention is the printed matter

Art Unit: 3765

and that is not a patentable claim distinction. Since the only difference is the content of the information set forth by the indicia, then this difference is not set forth as a patentable distinction. It has been held that when the claimed printed matter is not functionally related to the substrate it will not distinguish the invention from the prior art in terms of patentability. Therefore when the prior art describes all of the claimed structural and functional relationships (in this case the function of the printed matter on the blanket shows the placement of the user and wherein the blanket surfaces support the indicia, which is the same function as Isola et al (between the descriptive material and the substrate, but the prior art describes a different descriptive material than the claim, then the descriptive material is non-functional and will not be given patentable weight. (See *in re Ngai*, 367 F.3d.1336, 70 USPQ2d 1862 (Fed. Cir. 2004)).

Furthermore, the fact that the content of the printed matter placed on the substrate may render the device more convenient by providing an end user with a specific type of information document or form does not alter the functional relationship. Mere support by the substrate for the printed matter is not the kind of functional relationship necessary for patentability. Therefore the fold illustrations printed on a blanket do not provide patentable subject matter.

The following is a reply to the submission of the declaration of Pamela Jordan, Phd, RN.

The declaration under 37 CFR 1.132 filed 12-12-07 by Pamela Jordan, Phd, RN is insufficient to overcome the rejection of claims 39-41 and 44-51 based upon the

rejection under 35 USC 103 as set forth in the last Office action because: the showing is not commensurate with the claims.

It include(s) statements which amount to an affirmation that the affiant has never seen the claimed subject matter before. This is not relevant to the issue of nonobviousness of the claimed subject matter and provides no objective evidence thereof. See MPEP § 716.

Just because the decal rant has not seen the present invention prior to applicant's does not mean that such a claimed invention did not exist or would not have been obvious to one having ordinary skill in the art to construct. Blankets are well known in addition to blankets with instructional indicia thereon as seen in Isola et al. accordingly one of ordinary skill in the art would have had the skill to place any common knowledge indicia on a blanket to instruct one on how to use the blanket as seen in Isola et al.

It include(s) statements which amount to an affirmation that the claimed subject matter functions as it was intended to function. This is not relevant to the issue of nonobviousness of the claimed subject matter and provides no objective evidence thereof. See MPEP § 716.

The fact that the swaddling blanket works well would have been obvious to one having ordinary skill in the art since it is well known that the common knowledge of how to fold a blanket for swaddling or for the placement of a person on a blanket as in Isola et al would have been obvious and easily obtained with such instructional indicia.

It refer(s) only to the system described in the above referenced application and not to the individual claims of the application. Thus, there is no showing that the objective evidence of nonobviousness is commensurate in scope with the claims. See MPEP § 716.

Applicant has only described the invention in general terms and has not been specific to the claims. Applicant has only generally stated that the invention itself is new, unique and innovative, all of which are opinion not supported by facts relating to the claims.

In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness.

NO real factual evidence has been given by the declarant, Ms., Jordan that supports the declarant's opinion.

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The declaration under 37 CFR 1.132 filed 12-12-07 by Lynette Damir, RN, the inventor, is insufficient to overcome the rejection of claims 39-41 and 44-51 based upon the rejection under 35 USC 103 as set forth in the last Office action because: the showing is not commensurate with the claims, no nexus between the claimed invention and the Commercial Success has been clearly shown and supported by factual evidence.

Pages 1-2 of the declarant's declaration is clearly opinion and background information in regard to the subject matter of the invention. Such subject matter is well

Art Unit: 3765

known in publications and periodicals in addition too being known to humans over centuries.. The benefits of such swaddling is also well known. There is no nexus between the claimed invention in the claims and the commercial success claimed. There is no clear evidence given that the blanket itself with the instruction on the blanket would meet the unmet need any more than the instructions being given in a book, publication or told to the user by word of mouth. The claimed invention as claimed does not indicate a specially shaped or formed blanket. Only a general rectangular blanket that has a label with swaddling instructions thereon has been claimed. No proof or evidence that a blanket with a publication or informed person to instruct the folding of the blanket to swaddle a baby would d not have been just as instructive or successful in swaddling a baby. New parents would inherently not know ho to swaddle a baby and only those with such experiences would know how to educate those that do not known. No specific blanket structure has been claimed other than the labeling. The Gap blanket did not include the instruction on or with the blanket and therefore does not appear to be a copy. It is just a blanket of a certain size, color and design decorations thereon. Therefore it is not a copy with the instructions included. It is not clear as to how it was considered to be a knock off if the instructions were not on or included with the blanket. Manufacturers can and are allowed to construct baby blankets of any size, shape and design and without the labeled instructions it is not clear as to why the Gap would have had to stop selling their blanket that did not include such labeling. The same is true with the Babystyle blanket with instructive tags. The written Gap instructions are also not a direct copy but appear to

Art Unit: 3765

only include an instruction tag of well known information. The illustrated instructions as seen in applicant's invention claims was not on either of those blankets. Therefore they do not appear to be copies. The information on the competitors blankets- in a written form are common knowledge information and is not information created by the inventor. IT is information that is already present in the marketplace.

Therefore it is not clear as to how the applicant can claim ownership of the information.

The positive feed back and comments are only people's opinions. There is no evidence that the unlabeled blankets did not sell only for the reason that they did not include the label. The characteristics of the blankets themselves, price and lack of advertising could have caused the lesser sales amounts than applicant's claimed invention and not that the label was not included. Therefore there is no nexus between the claimed invention and that of commercial success as claimed. There is no evidence that the commercial success is only due to the label and not the characteristics of the inventive blanket itself. IT is not evident that the commercial success of applicant's blanket was not due to heavy promotion, advertising, a shift in advertising, consumption by regular purchasers normally tied to the applicant or their representatives or the regular customers of the manufacturer or stores or other business events extraneous to the merits of the claimed invention. The inventors opinion as to what the claimed features were responsible for commercial success of an article is not evidence of non-obviousness. The opinion does not serve as sufficient to demonstrate the nexus between the sales and the claimed invention. The sales figures must be adequately

defined and substantiated by sales receipts or purchase orders and not just a statement by the inventor or assignee. Gross sales figures do not show commercial success absent evidence of market share or as to what sales would normally be expected in the market.

Also the previous failure of the long felt need for the blanket may be due to factors such as lack of interest or lack of appreciation of the inventions potential or marketability rather than want of technical know how.

The alleged copying of the invention is not persuasive of non-obviousness when the copy is not identical to the claimed product. The previously sold Gap and Babystyle blankets were not identical copies and the comparison is not a fair comparison.

Since the instructive information is common knowledge and widely known and instructed in other ways by others there does not appear to be a long felt need for a septic blanket with an illustrated picture thereon. Any instructions included with a blanket would serve the same purpose and fulfill that long felt need.

Applicant did not include any evidence of specific sales records with their sales statements.

Therefore, the declarations do not overcome the rejection under 35 USC 103 above.

Response to Arguments

Applicant's arguments filed 12-12-07 have been fully considered but they are not persuasive.

The rejection of the claims as discussed at the top of page 6 of applicant's response occurred after the finding of new prior art and a consultation with a Primary Examiner in the blanket class 5. Upon further searching Examiners often unearth new prior art references that meet amended claims and require new rejections.

Applicant's invention is a blanket that has an introductive illustration on a blanket to instruct one as to the use of the blanket. Isola's blanket is also a blanket that has an illustration thereon that instructs one as to the placement of the person on the blanket and the use of the blanket. Applicant is not claiming a specific method of use. However, Isola's inventive blanket with illustrations also would inherently teach that use as does applicant's. Applicant is claiming a blanket apparatus just as Isola does. The content on the blankets is just "printed matter" that is selected by the maker on how to use the blanket. IF the blanket was used to wrap around only a head and the illustration showed on a head of a wearer such illustrations would not have any patentable weight. Just as applicant's illustrations do not have any more patentable weight over the Isola et al reference. One of ordinary skill in the art would have had the knowledge to put any known instructive illustrations on the blanket as desired to teach or instruct whatever they desire. The scope of the invention is a blanket with indicia thereon to instruct a user on how to use the blanket which is the same as the prior art of Isola et al. One of ordinary skill in the art would have had the skill to place any known instruction of use on the blanket as desired in order to use the blanket for swaddling or otherwise. The only difference between the invention and the prior art is the difference in the printed matter

in the illustrations on the blanket. The secondary considerations have been discussed above in regard to the two submitted Declarations.

IN conclusion the rejection under 35 USC 103 still stands.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gloria Hale whose telephone number is 571-272-4984. The examiner can normally be reached on Mon.-Thurs...

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gary Welch can be reached on 571-272-4996. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3765

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Gloria Hale/
Primary Examiner, Art Unit 3765
